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NOTHING LASTS FOREVER: TOWARD A COHERENT THEORY IN AMERICAN PRESERVATION LAW

Kathryn R.L. Rand*

We instinctively act to preserve, to forestall "the eternal silence created by the destruction of culture."¹

Once thought to be the province of little old ladies² and civil war history buffs, preservation of historic and cultural objects is a relatively recent, but growing, concern in the United States. Historic and cultural preservation, however, is an expansive and difficult-to-define concept involving a spectrum of issues ranging from tax advantages to environmental concerns.³ What we regard as historically or culturally significant has changed dramatically in recent years, as evidenced by the movement to include accounts of minorities and women in history texts.⁴ Preservation itself is also a diverse and elusive term. After deciding what to preserve, one must also decide how to preserve it: to maintain it, restore it, remove it from its situs, protect it, or merely record it.

Most would agree that at least some degree of historic and cultural preservation is an important part of a nation's heritage and culture. Because preservation and historic and cultural significance are such broad and ambiguous concepts, however, laws regarding preservation are particularly susceptible to

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1. John H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 347 (1989) (quoting Manfred Lachs, *The Defenses of Culture*, 37 MUSEUM 167, 168 (1985)).

2. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 477 (1981).

3. *Id.* at 475-76.

4. History is determined by the social views of the present. "In a sense, every event is 'history,' . . . views of 'historic significance' alter considerably with shifting social interests—a point amply attested by the sudden discovery of black history, the boom in the history of women's movements, and the reinterpretation of the Cold War." *Id.* at 476.

arbitrariness.⁵ To preserve a nation's cultural treasures effectively, applicable laws must define what is historically or culturally significant and indicate how these things should be preserved. This requires an underlying theory of preservation, currently lacking in American law. This Note outlines such a theory by building on the Abbé Henri Grégoire's writings, which originated modern preservationist thought, and on the experience of historic and cultural preservation in Italy, arguably the culturally richest nation in the world.

Part I of this Note examines Grégoire's liberty-based theory of preservation and discusses the three rationales that underlie his theory. Part II examines the development of preservation law in the United States, following it through three stages: patriotic inspiration, aesthetic merit, and community. Part III examines Italy's experience with preservation in order to identify and discuss several problems inherent in preservation law. Part IV suggests preservation rationales for courts and legislators to consider and identifies problems for them to avoid.

I. THE ABBÉ GRÉGOIRE'S THEORY OF PRESERVATION

Preservation of cultural artifacts is a relatively recent concept. Historically, most cultural artifacts were neglected or in the worst cases, destroyed. Although some objects were preserved for aesthetic or religious reasons,⁶ protection of cultural treasures was not a public concern. For the most part, ascending monarchs preferred to destroy marks of outgoing regimes or to recycle the building materials for their own monuments rather than preserve the older ones.⁷ For example,

5. *Id.* at 477.

6. Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1143 (1990). The original wooden pillars of the Temple of Hera at Olympia, for example, were replaced with cut stones, except one, by the second century A.D. "Presumably this single oak column had been allowed to remain out of piety, as a visible symbol of the antiquity of the temple on this site." Walter M. Whitehill, "Promoted to Glory . . .": *The Origin of Preservation in the United States*, in WITH HERITAGE SO RICH 35, 35 (U.S. Conference of Mayors ed., 1966).

7. Occasionally rulers preserved monuments of past regimes. In Rome during the fifth century A.D., the Emperor Majorian passed strict laws to preserve the monuments of the Roman Empire:

[T]he fairest forms of architecture were rudely defaced for the sake of some paltry or pretended repairs . . . Majorian, who had often sighed over the desolation of the city, applied a severe remedy to the growing evil. He reserved to the prince

Thutmose III, the successor of Hatshepsut in ancient Egypt, obliterated Hatshepsut's cartouche,⁸ as well as those of her officials, from her temples and monuments and replaced them with either his own cartouche or the names of Thutmose I or Thutmose II.⁹ In Rome during the early centuries A.D., ancient architecture was routinely dismantled and destroyed to create building materials for new structures.¹⁰ In prerevolutionary France, "the remains of old churches would unceremoniously be torn down to make way for new ones, and statues and columns were for centuries routinely recycled as building materials."¹¹

These examples illustrate the fundamental conflict in preservation law: preservation versus progress. Artifacts of old regimes were destroyed to make way for new regimes, both physically and ideologically. "As emblems of tyranny overcome, ruins bespoke fearsome rulers gone to just deserts, once-sumptuous mansions decaying into humble abodes."¹²

Professor Joseph L. Sax traces the origins of historic preservation theory to revolutionary France.¹³ In revolutionary

and the senate the sole cognisance of the extreme cases which might justify the destruction of an ancient edifice; imposed a fine of fifty pounds of gold (two thousand pounds sterling) on every magistrate who should presume to grant such illegal and scandalous license; and threatened to chastise the criminal obedience of their subordinate officers by a severe whipping and the amputation of both their hands.

2 EDWARD GIBBON, *DECLINE AND FALL OF THE ROMAN EMPIRE* 315 (1932) (footnote omitted).

8. A cartouche is an oval figure on Egyptian monuments which contains the name of a ruler or a deity. WEBSTER'S NEW WORLD DICTIONARY 219 (2d ed. 1986).

9. See, e.g., JAMES H. BREASTED, *A HISTORY OF EGYPT* 283 (1909); ALAN GARDINER, *EGYPT OF THE PHARAOHS* 187 (1961); GEORGE STEINDORFF & KEITH C. SEELE, *WHEN EGYPT RULED THE EAST* 46 (1957).

10. Whitehill, *supra* note 6, at 36 ("[W]hatever was built anew in Rome was at the cost, and from the materials of, the ancient city. Blocks of stone and columns were cannibalized for new construction; statues and inscriptions found their way into the kilns of the lime-burners."). Roman "cannibalization" of ancient architecture has a modern counterpart:

In Savannah [Georgia], perhaps the greatest loss is due to the speculative price on old Savannah gray brick, a material which has become a prestige item selling for a dollar a brick. Fine old buildings are being torn down for their bricks which are being used in the various parts of the city for the construction of motels, filling stations and contemporary houses. This is probably the only city in the United States in which historic structures are mined as the Roman Forum was up to the last century.

Carl Feiss, *Our Lost Inheritance*, in *WITH HERITAGE SO RICH*, *supra* note 6, at 129, 132.

11. Sax, *supra* note 6, at 1150.

12. DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 175 (1985).

13. Sax, *supra* note 6, at 1143.

France, repudiating the old regime was particularly important. The French, embracing new politics and values, forcibly ushered out the old regime.¹⁴ Whether the values of the old order could be eradicated without eradicating its most prominent physical evidences depended on whether the artifacts could take on new meaning and value and somehow be separated from the regimes which had produced them.¹⁵

It was against the background of the French Revolution that the Abbé Grégoire¹⁶ formulated his theory of preservation. He felt that people with true artistic genius do not conform to the ugliness of their cultures. Grégoire sought to preserve the untarnished genius contained in art.¹⁷ Grégoire's theory involved three purposes of preservation: liberty, national identity, and the building of a new society.

A. The Spirit of Liberty

The Abbé Grégoire proposed that preservation was a public duty required by the French Revolution's self-proclaimed political values.¹⁸ Grégoire based his theory of preservation on the Revolution's spirit of liberty. He argued that the realization of true liberty required three things:

First, that liberty is only realized where the talent and creative energies of the individual flourish. Second, that only where tolerance for difference and respect for creativity exist can that flourishing occur. And third, that the pursuit of knowledge and repudiation of ignorance are essential to a process where talent and creativity will blossom.¹⁹

14. *Id.* at 1153-54 ("[C]heering crowds tore down statues of French kings all over Paris. The revolutionary government mandated the destruction of statues erected in honor of despotism in order to demonstrate to the people that the Assembly was aware of their regard for liberty.").

15. *Id.* at 1153.

16. The Abbé Henri Grégoire (1750-1831) was a French bishop of the Constitutional Church. At the time of the campaign against Christianity in France during the late eighteenth century, he worked to preserve monastery libraries and religious artworks. 5 *ENCYCLOPEDIA BRITANNICA* 476 (1992).

17. Sax, *supra* note 6, at 1155.

18. *Id.*

19. *Id.*

Grégoire suggested that expressions of talent and creativity are the fruits of liberty and should be preserved as such, without regard to their origin. Grégoire saw art as the product of individual liberty, not of political regimes. Works of art were "examples of the free spirit—genius and talent realized—triumphant over political repression, error, and superstition."²⁰ By focusing on the artist instead of the patron, Grégoire successfully depoliticized "tainted" art.²¹ Thus, Grégoire asserted that talent and creativity are the foundations of liberty, and that art, as a manifestation of liberty, must be preserved.

B. The National Identity

According to Grégoire, the quality of a society is defined and represented by its cultural properties. In France following the Revolution, the new regime needed to redefine its country. Grégoire argued that the quintessence of a nation is demonstrated by the genius of its individual citizens and that the heritage of a nation is embodied in the artifacts of its citizens' achievements.²² A nation that neglects its cultural artifacts robs itself of its defining heritage.

C. The Building Blocks of Society

Grégoire saw artifacts as building blocks of society, as "necessary capital that the citizens of the newly liberated nation would have to employ to create their new society."²³ New governments should not try to mold society from scratch; instead, they should build on and surpass past achievements, which serve as models, inspirations, and means of instruction for future endeavors.²⁴ A society's artifacts were its "common

20. *Id.*

21. *Id.* Grégoire's philosophy was that "no patron's motives, however base, can demean the genius of the artist; . . . the human spirit can never be made the mere instrument of tyranny." *Id.*

22. *Id.* at 1156.

23. *Id.* at 1157.

24. *Id.* at 1156–57. Grégoire wrote that "the artisan who has seen only his own

intellectual and aesthetic assets,"²⁵ belonging to all its citizens.

workshop cannot imagine the possibility of a better one." *Id.* at 1162 (quoting HENRI GRÉGOIRE, *Rapport sur l'établissement d'un conservatoire des arts et métiers*, in 2 OEUVRES DE L'ABBÉ GRÉGOIRE 281, 289 (Kraus-Thompson Org., Ltd., 1977)).

25. *Id.* at 1157. Professor Sax explores the idea of cultural objects as common property further in his second article on the origins of modern preservation. See Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543 (1990). In mid- and late-eighteenth century England, development threatened to destroy many of England's ancient ruins, most of which were under private ownership. *Id.* at 1545. In response to the impending destruction, early preservationists advocated that the private owners were only trustees of cultural properties, which belonged to the nation as a whole. *Id.*

Sir John Lubbock was among these early preservationists. In 1873, Lubbock, then a member of Parliament, introduced "A Bill to Provide for the Preservation of Ancient National Monuments." *Id.* In its original form, the bill provided that owners of antiquities designated as ancient monuments would have to notify the government and offer it the monument for purchase before undertaking construction on the site. If the government refused its right of purchase, the owners were free to proceed with the construction. If the government chose to purchase the property, the owners were entitled to full compensation. *Id.* at 1547.

Although Lubbock's bill was intended to be uncontroversial, it was strongly opposed. *Id.* The opposition sprung from the clash between the competing values of common cultural property and private ownership. Lubbock's bill was not just a matter of eminent domain, as "[i]t did not simply involve a conflict over space, but a conflict of agendas about the right use of land or other property." *Id.* at 1550. Many perceived Lubbock's bill as a step on a greatly feared slippery slope: if the government could dictate control over an ancient ruin, why not over other things as well? *Id.* at 1550-51. Parliament finally enacted a preservation law in 1882 without provisions for notice to the government or government right to purchase, which were the teeth of Lubbock's bill. *Id.* at 1547.

Lubbock's bill was based on the theory that ancient monuments were different from other property held in private ownership because they had a dual nature. Professor Sax explains Lubbock's duality theory of cultural property as follows:

[P]roperty had two distinct elements. The element that belonged to proprietors was the economic value or use value of their property. Insofar as that was taken away, the proprietors were entitled to full compensation. The monuments had another element, however—namely, their historic and scientific value—which belonged to the nation. The idea was that the history of England, though it might in part be embedded in a physical structure, could hardly be said to belong to some individual. In preventing the destruction of its history, the nation was not taking something away from the owner, but was safeguarding something of its own. Whether the claim was put in proprietary terms, as something "belonging" to the nation, or in some less legalistic form, the concept was the same: The nation as a collectivity had a preexisting interest in many objects that had always been considered entirely private.

Id. at 1554.

Although Lubbock gave no authority to support his proposition of the duality of ownership of monuments, Professor Sax speculates that Lubbock may have based this concept on the treatment of the crown jewels. *Id.* at 1556. The crown jewels of England are legally heirloom property, which means that the owner must pass them on to the owner's heir. *Id.* The crown jewels, in addition to being valuable pieces of jewelry, are a symbol of the English monarchy and its history. *Id.* at 1557. Ownership of the jewels

To destroy past achievements would be "to demean the notion of liberation by converting it into a celebration of willful ignorance."²⁶

While revolutionary politics included anti-intellectual book burnings and denunciation of the fine arts,²⁷ Grégoire sought to educate the masses through the fine arts. He argued that "[i]n a certain sculpture, which is a masterpiece, the ignorant see only a carved stone; let us show them that this marble breathes, that canvas is living, that this book is a veritable arsenal to defend their rights."²⁸ To Grégoire, knowledge was the key to liberation, while ignorance was bondage.²⁹ Education, and therefore liberation, of the masses required preservation of the artifacts of past achievements.

Moreover, Grégoire argued that advancements in the arts and sciences were necessary for advances in practical, everyday life. He believed that if a society ignored high culture, then the practical industries of that society would suffer.³⁰ Conversely, if a society nurtures its high culture, its practical industries will benefit.³¹

II. THE DEVELOPMENT OF PRESERVATION LAW IN THE UNITED STATES

Grégoire explained why the preservation of historic and cultural objects should be a national concern. The United States, however, was more concerned with expansion and development than with the preservation of its national heritage.³² As our nation developed, however, Americans began to realize the importance of preservation.

carries a responsibility of preservation. *Id.* Lubbock wanted such responsibility for preservation to apply to private owners of antiquities as well. *Id.*

26. *Id.* at 1157.

27. *Id.* at 1158-59.

28. *Id.* at 1160 (quoting HENRI GRÉGOIRE, *Second rapport sur le vandalisme*, in 2 OEUVRES DE L'ABBÉ GRÉGOIRE, *supra* note 24, at 321, 330).

29. *Id.* at 1162.

30. *Id.* at 1163. Grégoire wrote, "When I hear it said that all it takes to be a good farmer are strong arms, I pray that they will let me have a clear head to lead them." *Id.* at 1162 (quoting HENRI GRÉGOIRE, *Nouveaux développements sur l'amélioration de l'agriculture, par l'établissement de maisons d'économie rurale*, in 2 OEUVRES DE L'ABBÉ GRÉGOIRE, *supra* note 24, at 328).

31. *Id.*

32. Rose, *supra* note 2, at 474.

By the mid-1800s, the historic preservation movement in the United States had gained significant popularity and support.³³ The movement spurred the development of historic preservation law, beginning with the Supreme Court's decision in *United States v. Gettysburg Electric Railway Co.*³⁴ and culminating with its decision in *Penn Central Transportation Co. v. New York City*.³⁵ Preservation law in the United States has not followed a coherent theory such as that offered by the Abbé Grégoire, but has progressed through three periods, each marked by a particular view of the purpose of historic and cultural preservation: patriotic inspiration, aesthetic merit, and community.

A. Patriotic Inspiration (1890–1929)

The first stage of American preservation law, patriotic inspiration, was marked by preservation of structures in which nationally famous people had lived or where important events had occurred.³⁶ Early attempts at preservation were on the local level.³⁷ For example, when Mount Vernon, George Washington's home, fell into disrepair in the 1850s, neither the state of Virginia nor the federal government was willing to buy it.³⁸ The mansion was in danger of becoming a private hotel, and at worst, being destroyed to make way for industrial development. Private citizens took up the cause: Ann Pamela Cunningham of the Mount Vernon Ladies' Association undertook a fundraising campaign,³⁹ and Edward Everett, a statesman and orator, gave lectures supporting the preservation of Mount Vernon.⁴⁰ Cunningham and Everett managed to save the mansion, and Cunningham's efforts provided an example for other preservation organizations to follow.⁴¹

33. Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It's Been, Where It's Going*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 1, 1 (Christopher J. Duerksen ed., 1983).

34. 160 U.S. 668 (1896). See *infra* text accompanying notes 42–46.

35. 438 U.S. 104 (1978). See *infra* text accompanying notes 89–107.

36. Rose, *supra* note 2, at 479–80.

37. Duerksen & Bonderman, *supra* note 33, at 2.

38. *Id.* at 1.

39. *Id.* at 1–2 (mistakenly naming Cunningham as Pamela Sue).

40. Rose, *supra* note 2, at 482.

41. Duerksen & Bonderman, *supra* note 33, at 2. Cunningham directed the Mount

The patriotic inspiration stage of American preservation law is exemplified by *United States v. Gettysburg Electric Railway Co.*⁴² The case arose out of a \$25,000 appropriation by Congress for a national battlefield memorial at Gettysburg.⁴³ When the Gettysburg Electric Railway Company began construction of a railroad over a portion of the battlefield, Congress condemned the Railway's property.⁴⁴ The issue before the Court was whether Congress' intended use of the land was a public use for which Congress was authorized to condemn land.⁴⁵ The Court concluded that preservation of the battlefield served a public purpose and therefore was within the government's condemnation power.⁴⁶ The Court's decision, which recognized for the first time the federal government's power to preserve historic sites, clearly demonstrates the patriotic inspiration rationale:

The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. . . . Can it be that the government is

Vernon Ladies' Association: "Ladies, the home of Washington is in your charge—see to it that you keep it the home of Washington! Let no irreverent hand change it; let no vandal hand desecrate it with the fingers of progress." Christopher Tunnard, *Landmarks of Beauty and History*, in *WITH HERITAGE SO RICH*, *supra* note 6, at 29–30; see also George Zabriskie, *Images of Tradition*, in *WITH HERITAGE SO RICH*, *supra* note 6, at 64, 125 ("When women wore hoop skirts, were generally flattered and despised as the weaker sex, they showed their strength: Washington's house is ours, because they made it theirs.").

42. 160 U.S. 668 (1896).

43. Congress had earmarked the amount for

the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure

Sundry Civil Expenses Appropriation Act, ch. 208, 27 Stat. 572, 599–600 (1893).

44. 160 U.S. at 670–71.

45. *Id.* at 679.

46. *Id.* at 680–81.

without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? . . . It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such an action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made.⁴⁷

In *Roe v. Kansas*,⁴⁸ the Supreme Court upheld the states' condemnation power for the purpose of preserving historic sites.⁴⁹ Kansas, acting under a statute which allowed it to condemn land "invested with unusual historical interest,"⁵⁰ condemned the site of the Shawnee Mission near Kansas City.⁵¹ The Methodist Church founded the Shawnee Mission as an Indian mission in 1829.⁵² Katherine Roe and other affected

47. *Id.* at 681-82.

48. 278 U.S. 191 (1929).

49. *Id.* at 193.

50. 1921 Kan. Sess. Laws 436, 437.

51. *State ex rel. Smith v. Kemp*, 261 P. 556, 556-57 (Kan. 1927).

52. *Id.* at 558. The Kansas Supreme Court, which had upheld the state's condemnation, described the mission's historic significance:

For many years the Mission remained the farthest permanent outpost of Western civilization, and life at the Mission forms a chapter of absorbing interest, not only in the history of Kansas, but in the history of missionary methods of promoting civilization. . . . Altogether, the Shawnee Mission was so intimately connected

landowners, hoping to use their land for residential developments,⁵³ argued that condemnation of the land for the purpose of preserving a historic site was not a use of the land and, accordingly, could not be a public use.⁵⁴ The Kansas Supreme Court disagreed, explaining the importance of preservation in bettering the citizens of Kansas through patriotic inspiration:

The end to be subserved by state promotion of intellectual and moral improvement is better citizenship; and good citizenship is inculcated by giving attention to history as history is now conceived. History is no longer a record of past events. It is an illuminating account of the expanding life of man in all its manifestations, revealing how each stage of civilization grows out of preceding stages, revealing how the past still lives in us and still dominates us, and enabling us to profit by what has gone before. So considered, history is inspirational. The Santa Fé and Oregon Trails are not merely old-time routes of trade and emigration, whose furrows in the earth's crust interfered with tillage when agriculture developed along their courses; they are highways of the indomitable spirit of man in earnest and arduous quest and fired with passion of purposeful endeavor. Considered in this way the career of man and the careers of men stir the emotions, arouse enthusiasm, and awaken zeal which fuse into patriotism; and patriotism is regarded as a worthy quality of citizenship. If, therefore, the Shawnee Mission, rescued from private ownership, and restored, protected, and preserved by the state, will bear tidings to this and future generations of the vicissitudes, the perplexities, and the frustrations, the consecrated devotion, the dauntless bravery, and the splendid achievements denoted by the inscription on the state's great seal, "Ad astra per aspera," and will do this with a power upon the hearts and lives of men and women which will make for better citizenship, the use is a public one.⁵⁵

with "the conquest of civilization" and "the ordeal of civilization" in Kansas and in the western part of the United States, that, if it be fitting to maintain historical shrines, the place is worthy to be preserved as one.

Id.

53. *Id.* at 557.

54. *Id.*

55. *Id.* at 558-59.

The United States Supreme Court dismissed the writ of error to the Kansas Supreme Court, stating simply, "[i]n view of what was said in *United States v. Gettysburg Electric Railway Co.*, there is no basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public."⁵⁶

Despite *Gettysburg* and *Roe*, preservation efforts during this period largely remained on the level of local governments.⁵⁷ In 1906, Congress enacted the Antiquities Act,⁵⁸ which allowed the President "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."⁵⁹ Although the Antiquities Act was important in protecting historic and archaeological sites, it affected only those sites already owned by the federal government.⁶⁰

B. Aesthetic Merit (1930-1955)

The second stage of American preservation law developed out of a concern for aesthetics. This shift in focus to cultural, artistic, and architectural merit occurred after the turn of the century, when professional artists and architects joined the preservation effort.⁶¹ Three important Supreme Court cases involving local ordinances set the groundwork for this stage of American preservation law.

In *Welch v. Swasey*,⁶² the Court upheld a Massachusetts statute restricting the height of buildings in Boston residential areas.⁶³ Welch challenged the validity of the statute under the state's exercise of its police power, arguing that the purpose of the statute was "purely . . . aesthetic, to preserve architectural symmetry and regular sky-lines."⁶⁴ The Court avoided the issue

56. 278 U.S. at 193 (citation omitted).

57. See Duerksen & Bonderman, *supra* note 33, at 3-5.

58. Ch. 3060, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431-433 (1988)).

59. 16 U.S.C. § 431 (1988).

60. *Id.*; Duerksen & Bonderman, *supra* note 33, at 8.

61. Rose, *supra* note 2, at 480.

62. 214 U.S. 91 (1909).

63. *Id.* at 108.

64. *Id.* at 96.

of whether government could regulate on the sole basis of aesthetics and upheld the restriction on the ground that it reasonably was related to public health and safety.⁶⁵ The Court noted, however, that "considerations of an aesthetic nature," in addition to permissible public health and safety purposes, would not invalidate the statute.⁶⁶

Aesthetic concerns survived another preliminary challenge in *Village of Euclid v. Ambler Realty Co.*⁶⁷ Ambler Realty Company challenged a zoning ordinance requiring building construction to conform to a comprehensive plan. The ordinance greatly reduced the value of a tract of land owned by the realty company.⁶⁸ The Court held that application of the ordinance did not constitute a taking because all nearby landowners were similarly restricted.⁶⁹ Based on the mutuality of benefits and burdens imposed by the ordinance, the Court found it nondiscriminatory and reasonable.⁷⁰

Cities, unsure of the constitutional validity of preservation laws based on aesthetic concerns, avoided listing aesthetics as a purpose for preservation and usually stated economic rationales such as encouraging the local tourist industry.⁷¹ In 1954, the Supreme Court decided *Berman v. Parker*,⁷² giving strong support for aesthetically-based government preservation actions:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.⁷³

65. *Id.* at 107. The Court focused on the increased danger of fire in tall buildings in residential areas. *Id.* at 107-08.

66. *Id.* at 108.

67. 272 U.S. 365 (1926).

68. *Id.* at 384.

69. *See id.* at 388-89.

70. *Id.* at 395.

71. Duerksen & Bonderman, *supra* note 33, at 6.

72. 348 U.S. 26 (1954).

73. *Id.* at 33 (citation omitted). Although *Berman* is often cited in support of preservation efforts, the Court actually upheld the destruction of an older but structurally sound building in an urban renewal area. *See Rose, supra* note 2, at 486-87.

By upholding aesthetics as a valid preservation rationale, the Court effectively broadened the government's ability to engage in preservation efforts.

As local governments increased their preservation efforts through expanding preservation rationales, so did the federal government. In 1935, Congress enacted the Historic Sites Act,⁷⁴ which declared "that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."⁷⁵ This considerably broadened the federal government's role in preservation efforts. The Historic Sites Act, in part, authorized the Department of the Interior to survey and identify historic sites throughout the United States,⁷⁶ to preserve historic sites through restoration and maintenance,⁷⁷ and, more importantly, to help preserve privately owned historic sites.⁷⁸

C. Community (1956-1980)

The third developmental stage of American preservation law focused on local communities. This stage emphasized "the contribution of the physical environment to the maintenance of [the] community."⁷⁹ The rationale behind this emphasis was that "[p]reservation serves economically to recycle old structures, socially to revitalize communities, and symbolically to link the culture of the present to that of the past through the juxtaposition of their architectures."⁸⁰

The city dweller's sense of place is one aspect of the community-building rationale.⁸¹ Landmarks help to orient people both geographically and psychologically, and a mixture of old and new landmarks can make those people feel both exhilarated

74. Historic Sites Act, ch. 593, 49 Stat. 666 (1935) (codified at 16 U.S.C. §§ 461-467 (1988)).

75. 16 U.S.C. § 461.

76. *Id.* § 462(b).

77. *Id.* § 462(f).

78. *Id.* § 462(e).

79. Rose, *supra* note 2, at 488.

80. NATHAN WEINBERG, PRESERVATION IN AMERICAN TOWNS AND CITIES at xv (1979).

81. Professor Carol Rose has discussed several aspects of architecture's psychological effect on urban dwellers, including the "need for buildings of varying ages and uses," "psychological and social consequences of structural layout," and the "phenomenon of *not feeling lost*." Rose, *supra* note 2, at 488-89. Landmarks make a city legible, so that "urban dwellers [can] find their way, [while] the architectural qualities themselves lend drama, interest, an occasion for anecdotes about the past, and thus a framework for identification with the shared experience of the community." *Id.* at 489.

and at home.⁸² At least one court has recognized this sense-of-place aspect of the community-building rationale. In *Commissioner of the District of Columbia v. Benenson*,⁸³ the owners of the Willard Hotel on Pennsylvania Avenue sought a permit to demolish the nonstructural elements of the hotel.⁸⁴ Although the hotel was boarded up and vacant,⁸⁵ the Fine Arts Commission recommended denial of the permit.⁸⁶ Although the court ruled against the preservationists,⁸⁷ it took the occasion to comment on the community benefits of preservation:

Retention of fine architecture, especially in the capital city of a relatively young country such as ours, lends a certain stability and cultural continuity, which can only contribute over the years to national substance. If one looks at the architecture of a city and sees only the present, the feeling of character is missing. Once the earlier architecture is demolished there is no retrieving it.⁸⁸

The community-building rationale adopted by most courts and legislatures, however, has developed as a combination of preservation rationales, such as aesthetics, education, economy, inspiration, and heritage. In *Penn Central Transportation Co. v. New York City*,⁸⁹ considered the preeminent preservation case, the Supreme Court implicitly accepted the community-building rationale. In this case, the Landmarks Preservation Commission denied Penn Central's request to build a multistory office building atop Grand Central Terminal. In so doing, the Court implicitly accepted protection of the existing layout of the city as a valid rationale for preservation efforts. The Court's opinion noted the role of preservation in education, economy, aesthetics, and our national heritage.⁹⁰

Penn Central Transportation Company owned Grand Central Terminal.⁹¹ In 1967, the Landmarks Preservation Commission

82. Tunnard, *supra* note 41, at 30.

83. 329 A.2d 437 (D.C. 1974).

84. *Id.* at 438.

85. *Id.*

86. *Id.* at 439. The Fine Arts Commission denied the permit, stating that "[r]emoval of exterior architectural features of this historic landmark is not recommended. Defacing or incompatible alteration of this facade is not in the public interest." *Id.* (alteration in original) (emphasis omitted).

87. *Id.* at 442.

88. *Id.* at 441-42.

89. 438 U.S. 104 (1978).

90. *Id.* at 108.

91. *Id.*

designated the Terminal a landmark⁹² pursuant to New York City's landmarks law.⁹³ This landmarks law protected the "existing urban fabric" of the city to benefit its citizens, thereby

fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "support[ing] and stimulat[ing] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city."⁹⁴

Designation as a landmark "impose[d] a duty upon the owner to keep the exterior features of the building 'in good repair'"⁹⁵ and required the owner to seek approval of the Commission before undertaking any alteration or improvement of the exterior features.⁹⁶ The Commission could approve alterations or improvements that would not "change or affect any architectural feature of the landmark and will be in harmony therewith," or that would not "hinder the protection, enhancement, perpetuation, and use of the landmark."⁹⁷

In 1968, Penn Central contracted with UGP Properties to construct an office building on top of the Terminal.⁹⁸ Penn Central submitted two plans to the Commission. In the first plan, UGP would build a fifty-five story building on the roof of the Terminal.⁹⁹ The second plan, which was for a fifty-three story building, required the builders to tear down a section of the Terminal.¹⁰⁰ The Commission denied both plans,¹⁰¹ stating that

to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic

92. *Id.* at 115.

93. N.Y.C. Admin. Code, ch. 8-A, §§ 205-1.0-207-21.0 (1976).

94. 438 U.S. at 109 (quoting N.Y.C. Admin. Code, ch. 8-A, § 205-1.0(b) (1976)) (alterations in original).

95. *Id.* at 111.

96. *Id.* at 112.

97. *Id.*

98. *Id.* at 116.

99. *Id.*

100. *Id.* at 116-17.

101. *Id.* at 117.

joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The addition would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.¹⁰²

Penn Central challenged the Commission's designation of the Terminal as a landmark and the rejection of the construction plans as a taking without just compensation and as an arbitrary deprivation of property without due process.¹⁰³ The Supreme Court decided the issue of whether the landmark restrictions imposed on Penn Central's property by New York City effected a taking of the property for a public use.¹⁰⁴

The Court first recognized the valid municipal interest in preserving historic landmarks, acknowledging that

in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. . . . [and] that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.¹⁰⁵

102. *Id.* at 117–18 (quoting the Landmarks Preservation Commission on the Record at 2251).

103. *Id.* at 119.

104. *Id.* at 122. In his dissent, Justice Rehnquist phrased the issue before the Court a little differently. "The question in this case," he stated, "is whether the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties." *Id.* at 139 (Rehnquist, J., dissenting). This phrasing puts the issue in a different light: the question is not whether cultural property should be preserved, but who should pay for that preservation.

105. *Id.* at 108 (footnotes omitted).

Penn Central conceded that the Terminal was capable of earning a reasonable return in its present state, and that the landmark status rendered some additional value to the Terminal.¹⁰⁶ The Court relied on these two concessions, as well as the fact that the Commission had not imposed a blanket prohibition on any additions to the Terminal, to hold that Penn Central's property rights were not so diminished as to effect a taking and that any financial burden on Penn Central was sufficiently mitigated.¹⁰⁷

Penn Central illustrates the ambiguity of preservation rationales currently cited by courts and legislatures. For example, the Congressional findings of the National Historic Preservation Act¹⁰⁸ include the community-building rationale: "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."¹⁰⁹ The Congressional findings do not solely endorse the sense-of-place focus of the community-building rationale. They also rely on the importance of patriotic inspiration, stating that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage."¹¹⁰ Finally, the findings point to several other preservation rationales, asserting that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."¹¹¹

Therefore, the development of American preservation law is marked by an accumulation of preservation rationales. Government ability to preserve has expanded with the development of additional theories, but American courts and legislatures have not adequately tailored preservation efforts to address the problems inherent in preservation. A coherent theory of preservation must consider its rationales carefully and address the pragmatic problems of preservation.

106. *Id.* at 129.

107. *Id.* at 136-37.

108. 16 U.S.C. § 470.

109. *Id.* § 470(b)(2).

110. *Id.* § 470(b)(1).

111. *Id.* § 470(b)(4).

III. PROBLEMS OF PRESERVATION: THE ITALIAN EXPERIENCE

Historic and cultural preservation raises several pragmatic problems: which objects and periods to preserve, whether to restore, remove, or replace, and how to balance preservation and progress. Because preservation is a relatively recent concern in the United States, and because the United States is a relatively young country, these problems have not developed in America to the same extent that they have in Europe. Therefore, this Part examines Italy, and Florence in particular, to illustrate the various problems of preservation.¹¹² Although Italy, as one of the culturally richest nations in the world, faces different problems than the United States, Italy's experience with preservation may serve as a source of guidance for preservation law in America.

A. Special Problems in Deciding What to Preserve

1. *Quantity of Cultural Treasures*—The number of works of art in Italy, though unknown, has been estimated at 100 million.¹¹³ Italy's wealth of cultural objects is overwhelming: "[t]he country has approximately 3,400 museums and archaeological sites . . . , 100,000 churches and chapels, 40,000 castles and other fortifications and at least 900 historically important town centers."¹¹⁴ The sheer number of cultural treasures makes preservation of all of the pieces impossible.¹¹⁵ The Italian government must prioritize preservation of its treasures in some way.

112. Some of the information on Italy in this section derives from my own observations during a trip to Florence in 1992. The trip included attendance at a Protection of Cultural Treasures seminar, conducted by Dean of the University of Michigan Law School Lee Bollinger. The seminar took place in Florence in May 1992.

I use Italy and Florence as illustrations only, and do not attempt to examine Italy's preservation laws. For a brief overview of preservation law in Europe, including Italy, see Robert R. Garvey, Jr., *Europe Protects Its Monuments*, in *WITH HERITAGE SO RICH*, *supra* note 6, at 151.

113. Jeffrey Rowland, *Italy's Plundered Treasures*, *WASH. POST*, Dec. 15, 1991, at G1, G11.

114. *Id.*

115. *Id.* (quoting Italy's undersecretary for the Ministero dei Beni Culturali, Luigi Covatta, as stating that "Italy has so much art, so many museums and churches and just not enough people to look after it all").

Traditionally, the goal of prioritization has been clear enough: preserve those works of art deemed to be of particular importance and quality. However, enough important artworks exist in Italy¹¹⁶ to make complete reliance on this goal inadequate. Another criterion in choosing which works to preserve could focus on the risk of destruction. This would direct that less money be spent on a painting in fairly good condition than the decorative exterior of a building that runs a greater risk of harm because of its higher degree of exposure. These strategies are fairly obvious.¹¹⁷ The real problem is the financial limitations of preservation. Italy cannot afford to maintain all of its important art forever. A functional theory of preservation could prioritize artworks according to the preservation rationales deemed important. For example, a statue, important for its historic and educational value, might justify the expense of restoring and housing it in a museum, whereas a building, important as a defining landmark, might best be left to age along with the city.

2. *Pieces that Span Periods*—Over the centuries, people of different tastes, morals, and styles have often altered or defaced cultural objects in Italy. This is particularly true of buildings, the completion of which can span centuries.¹¹⁸ Two options exist: restore each addition in its own style, or restore the entire structure to its best style.¹¹⁹

The choice between these two options is often highly criticized. For example, an editorial referring to San Jacopo sopo'Arno

116. See Paul Hofmann, *Decay and Theft Threaten Italian Treasures*, MIAMI HERALD, Aug. 13, 1989, at 1B ("UNESCO officials estimate that close to four-fifths of all architecture and other visual art in Europe that must be preserved for humankind are in Italy."). I accept that Italy houses many important artworks and choose not to challenge an arguably Eurocentric measure of the value of art.

117. But cf. *infra* note 132 (noting criticism of Florence officials' attempt to restore "second-rate" frescoes).

118. Restoration of the original state of buildings may not be as desirable in Italy as restoration of the original state of paintings. For example, workers removed the foliage covering the genital areas of Eve and Adam during a decade-long restoration of Masaccio's *Expulsion of Adam and Eve from the Garden of Eden* in the Brancacci Chapel in Florence. See Christine Temin, *Renaissance Restoration and Renewal*, BOSTON GLOBE, Dec. 23, 1990, at A1. Although this change was controversial, see *id.*, the argument that prevailed was that the restorers could show irrefutably that the leaves had not existed in Masaccio's original work. *Id.* That same argument does not work for the restoration of buildings, see, e.g., *supra* note 116 and *infra* notes 119–21 and accompanying text, because buildings do not have such a clear point of completion, and because one period represented in a building may be more in harmony with the rest of the city.

119. WEINBERG, *supra* note 80, at 16.

criticized monument restorers in Florence who, by removing part of the church's Baroque decoration to expose older Romanesque columns, "approach[ed] their task from an outmoded, archaeological point of view".¹²⁰

[Restorers in Tuscany are] determined to restore monuments to their original, pristine state, or where this is impossible, to reconstruct their original form, sometimes on insufficient evidence, and have no regard for the accumulations of succeeding centuries, for those accretions which are just as much part of the history of a place and often lend a monument its special charm. They are unaware of the passionate interest now being taken in Rococo and Neo-Classic decoration, in churches of a much earlier date, and wish to strip them of these allegedly irrelevant excrescences, if by doing so they can reveal part of the original structure dating any time from the Romanesque period to the High Renaissance. They do not understand that a building shows an historical stratification comparable with the geological formation of rock, but wish to dispense with the new rock strata in order to get down to the rock *they* prefer.¹²¹

A coherent theory of preservation and a specific agenda are necessary to decide what periods to preserve. An educational rationale would support the exposure of different stages of the church's architectural style in order to show its complete history. An aesthetic or community-building rationale, with greater

120. Editorial, *Restoration of Monuments in Tuscany*, 113 BURLINGTON MAG. 789, 789 (1970). The editorial describes the restoration as follows:

[T]he church was transformed in the first years of the Settecento and completed in 1709. The pavement has now been lowered, and the decorated pilasters have been demolished to reveal the original columns . . . , thereby destroying the ensemble of one of the few perfect examples of Baroque decoration in Florence. It is nothing short of tragedy.

Id. at 790. One wonders whether the editorial would have lamented over the tragedy of the removal of the leaves from Masaccio's *Expulsion*, had the leaves been one of the few perfect examples of some painting style. There is a sharp contrast between public reaction to restoration of buildings and restoration of paintings. See *supra* note 118.

121. *Restoration of Monuments in Tuscany*, *supra* note 120, at 789. The editorial probably was not advocating keeping all of the "accumulations of succeeding centuries," such as the historical graffiti on the base of the Duomo, the Cathedral of Florence, memorializing visits of American tourists during the nineteenth century, although in some ways the graffiti adds to the monument's charm.

regard to a pleasing appearance, would support maintaining the church in its familiar and best style.

The repaving of the Piazza della Signoria in Florence further illustrates the problems involved in choosing what period to preserve. When Florence officials decided to repave the Piazza, they wanted to replace the existing gray bricks with a "medieval design of red bricks outlined with gray stone."¹²² The National Arts Ministry rejected the city's plan and insisted that the original piazza be preserved and the old gray stones be removed, photographed, numbered, stored, and relaid.¹²³ The repaving of the Piazza caused another preservation problem when archaeologists took advantage of the removal of the stones by uncovering a Roman amphitheater, baths, and a textile factory.¹²⁴ The discovery was important because it shed new light on the role of Florence during the Roman Empire.¹²⁵ Most Florentines were unimpressed with the find,¹²⁶ however, and eventually the city filled the site with gravel and repaved according to the original plan.¹²⁷

Given that the apparent goal of Florence's preservation policies is to maintain a consistent period throughout the city,¹²⁸ the

122. William D. Montalbano, *In Florence, It's Politics vs. Preservation*, L.A. TIMES, Jan. 21, 1988, at A1, A13.

123. *Id.* During the repaving, however, the Minister of Cultural Patrimony visited the Piazza and saw that the stones that workers were laying "appeared strangely uniform and even bigger than the original stones." Diana J. Schemo, *Florence Fudges with the Ruins*, S.F. CHRON., Aug. 13, 1989, at 4. The Minister halted the repaving and demanded that the old stones be replaced, but the stones had disappeared. Later, the stones reappeared in the towns surrounding Florence, "where they ha[d] been used to build terraces on private homes and pave backyards." *Id.* As an official in Florence's Tourism Office explained: "You think those are new stones [in the Piazza]? . . . Those are not new stones. They're the old stones, which have been passed through a machine to make them look new. The papers are making it into a big scandal. But, really, it's not such a big scandal. It's a little scandal." *Id.*

124. Schemo, *supra* note 123, at 4.

125. *Id.*

126. *Id.* The Vice-Mayor of Florence explained:

We know what's there. Nothing that can't be found over and over in the rest of Italy. . . . A museum would disfigure the piazza, and they'd have to destroy about 20% of the excavation to give enough headroom for people to walk. Also it would cost many times more than straightforward repaving. If [the National Arts Ministry] want[s] to spend that kind of money, there are homeless artworks in need of repair in the basement of the Uffizi. There are palaces and monuments falling into ruin all over the city.

Montalbano, *supra* note 122, at A13.

127. Schemo, *supra* note 123, at 4.

128. See Montalbano, *supra* note 122, at A12 (quoting Giuliano de Marinis, the

next question is whether choosing one particular period and preserving it at the expense of artifacts from other periods is a legitimate goal for a city that contains much of the art that must be preserved for humanity.¹²⁹ As custodian of a great portion of the world's important art and architecture, perhaps Florence should have a duty not only to care for those artworks currently known to exist, but also to discover more of its great heritage. If Florence's only responsibility was to care for its discovered art, a great deal of important artifacts would remain unknown. Although such purposeful ignorance seems intellectually unpalatable, Florence already has so many cultural artifacts that it cannot care for them all. To add to this countless collection would simply be to spread the city's available funds even thinner. Perhaps Florence is better off leaving treasures buried, where nature, or lack thereof, perhaps will preserve them until the city can afford to care for them.¹³⁰ In any case, Florence illustrates the need for a coherent theory of preservation to answer these questions.

B. Special Problems in Deciding How to Preserve

1. *Restoration*—Preservation and restoration of artifacts is not a new practice. Past attempts at preservation and restoration, however, have not been as successful as the restorers intended.¹³¹ Modern technology has reduced the risks

archaeologist who discovered the Roman ruins in the Piazza della Signoria, as stating that "Florentines care only about the Renaissance. They don't give a damn about anything else").

129. See Hoffman, *supra* note 116, at 1B.

130. Egypt, like Italy, is a country incredibly rich with cultural treasures, but with far fewer resources. Michael D. Lemonick, *Perilous Times for the Pyramids; Without Help Soon, Egypt's Unique Archeological Treasures Will Be Lost to Humanity*, TIME, May 15, 1989, at 60. Because of Egypt's poverty and a policy disfavoring non-Egyptian archaeologists (an understandable policy, given the number of the country's treasures plundered by foreigners), much of Egypt's past remains undiscovered, unstudied, and uncared for. Kim Murphy, *Ancient Dispute Unravels; Experts Fear Egypt Risks Heritage By Sending it On the Road*, THE HOUSTON CHRON., Feb. 19, 1994, at 26; *Thieves Plunder Egypt's Tombs, Dealers Sell Treasures Worldwide*, AGENCE FRANCE PRESSE, Aug. 18, 1993.

131. See Uli Schmetzer, *Italian Shrine Upkeep Poses Monumental Task*, CHI. TRIB., Aug. 9, 1987, at C27 (quoting Maria Stella Spampinato, deputy director of Rome's Central Institute of Restoration, as stating that "[i]n the old days they used onions, potatoes and garlic to clean a monument. Sometimes they soaked frescoes in alcohol and burned it off. They even used caustic soda, and of course did more damage than good at times"); Temin, *supra* note 118, at A1 (reporting that past restorers used an egg-based lacquer to preserve paintings; however, the lacquer darkened with time, eventually obliterating parts of the paintings).

of restoration, even if the risks are not always apparent. In the late 1970s, for example, city officials in Florence decided to restore the frescoes on the ceiling of Brunelleschi's Duomo, the cathedral in the heart of Florence.¹³² The Duomo is not only Florence's defining landmark, but is important architecturally because Brunelleschi built it without internal support.¹³³ The restorers attached their scaffolding to holes in the dome, apparently left from Brunelleschi's original scaffolding that was used to decorate the dome. The holes were too loose to hold the modern metal scaffolding securely, so the workers filled the holes with concrete.¹³⁴ In retrospect, this was a mistake. The dome always had cracks, which, until about fifty years ago, were thought to have been caused by lightning.¹³⁵ Now, architects think that the cracks are caused by the contraction and expansion of the brick and stone with the changing seasons. After the addition of the concrete, which expands and contracts at a different rate than brick or stone, the cracks are widening at a rate of three inches per century, as compared to the previous rate of three-tenths of an inch per century.¹³⁶ As a result, the dome is aging fifty years for every year the concrete remains in place.¹³⁷

Accordingly, the risk inherent in preservation and restoration is that the technology may turn out to be faulty or inadequate. A conservative approach, both in choosing what artifacts to preserve or restore and in choosing a particular preservation or restoration technique, minimizes most of the risk.

2. *Removal of Pieces from Their Situs*—Preservation often requires the removal of an artwork from its original location.

132. *Life of Glorious Dome is Threatened by Man*, MIAMI HERALD, Sept. 29, 1987, at 18A [hereinafter *Life of Glorious Dome*]. An architect on the city commission to preserve the cupola described the circumstances of the decision: "One day a piece of fresco painted on the inside of the dome fell in some tourist's eye. It was war—in the eyes of the Arts Ministry. They immediately decided to restore the frescoes. Nobody thought about the cupola." Montalbano, *supra* note 122, at A12.

Some critics charged that the frescoes were second-rate, "too high up to be seen well and are ugly to boot," and that restoring them was not worth the risk to the Duomo. *Id.* at A13 (quoting Lando Bartoli, architect on the city commission to protect the cupola).

133. *Id.* at A12.

134. *Life of Glorious Dome*, *supra* note 132, at 18A.

135. This belief may have a mythical origin. "Heaven, it is said, so envied Brunelleschi's brick red dome soaring above Florence that it hurled down lightning bolts in hopes of destroying [it]." *Id.*

136. Montalbano, *supra* note 122, at A12; *Life of Glorious Dome*, *supra* note 132, at 18A.

137. Montalbano, *supra* note 122, at A12.

Florence officials removed Michelangelo's *David*, for example, from its original situs in the Piazza della Signoria to the Galleria dell'Accademia, where it is now on display. Although the move was necessary to protect the sculpture from the effects of pollution, it decontextualized the work.

Professor John H. Merryman argues that the decontextualization of art lessens its meaning:

Every cultural object is to some extent a part of a larger context from which it draws, and to which it adds, meaning. Separated from its context, "decontextualized," the object and the context both lose significance. At the extreme the object becomes anonymous, an orphan without reliable indication of its origin, its significance, its place and function as a part of something else.¹³⁸

Moving pieces from the place where the artist intended the work to be viewed alters the vision of the artist. Separating the artwork into parts for preservation also lessens the beauty and meaning of the work, as the whole is greater than the sum of its parts.¹³⁹ Nevertheless, preservation must take precedence over context: "mere decontextualization may be reversible; destruction seldom is."¹⁴⁰

3. *Copying Cultural Objects*—To preserve the context of a removed object, sometimes the object is replaced with a copy. A copy of Michelangelo's *David* stands in Florence's Piazza della Signoria, unbeknownst to many tourists who believe they are viewing the original.¹⁴¹ Because acid rain and smog had covered the original bronze reliefs with an opaque patina, city authorities replaced the East Doors of the Florentine Baptistry, which now

138. Merryman, *supra* note 1, at 356.

139. *Id.* at 357.

140. *Id.* at 358. Professor Merryman admits that "[t]here must be a point at which the degree of decontextualization becomes too trivial to have significant policy consequences." *Id.* For example:

[R]emoval of a Poussin painting from France decontextualizes it, since it was painted in France by a Frenchman, perhaps with the expectation that it would be seen and enjoyed by a French audience. To remove it from France, according to [an extreme] view, detaches it from its cultural context, with the attendant loss of cultural value. In that sense, most of the contents of the world's great museums suffer from decontextualization: Every export is an amputation.

Id. at 357.

141. See *supra* note 112.

bear a copy of Ghiberti's *Gates of Paradise*.¹⁴² The copy, which is as polished as the original is thought to have been, has been criticized by Florentines as gaudy.¹⁴³

Copies present the question of what to replace. We could replace only those objects that are in imminent danger of complete destruction, or, recognizing the harm caused daily by pollution, vibration, and even the respiration of tourists to artwork,¹⁴⁴ we could remove all cultural objects and replace them with copies. Professor Merryman argues that the truth of an object is lost when viewing its copy:

When we stand before . . . the manuscript of Justinian's Digest in the Gregorian Library in Florence, we feel a sense of satisfaction. This is the real thing, speaking truly of its time. When we discover that the original of the Digest manuscript is kept elsewhere for protection and we have actually been looking at a reproduction, we feel cheated, no

142. *Id.*; see also THE SOUVENIR BOOK OF FLORENCE 8 (Casa Editrice Bonechi 1988).

143. See *supra* note 112. Art viewers often are more comfortable with a piece in its aged, damaged state because that is the way they have come to know the artwork. See LOWENTHAL, *supra* note 12, at 160 ("The 'subtle tonal unity' of old master paintings was in fact induced more by dirt and London fog than by the patina of centuries, but widespread admiration of the 'golden glow' of aged led restorers to heap varnish on early masterpieces."); Temin, *supra* note 118, at A1 ("People came to cherish the mellow look of age in a painting. They were even willing to believe that Botticelli meant to paint his allegory of spring, 'Primavera,' in a palette of browns.").

144. Some artworks need protection from intentional damage as well as pollution. Michelangelo's *David* was attacked by a frustrated Italian artist wielding a hammer. Alan Cowell, *Must Florence Keep Its Art Shielded?*, MIAMI HERALD, Dec. 22, 1991, at 3F ("The vandal explained his action by saying: 'I envy Michelangelo for what he managed to make.'"). The attacker did not get further than the statue's toes, which have since been repaired, but the museum plans to put a high glass screen around the statue. *Id.* At the Uffizi gallery in Florence, museum curators have put glass in front of the most famous Botticelli pieces. *Id.*

Antonio Paolucci, Florence's superintendent of fine arts, estimates that about one percent of the five million tourists that come to Florence have psychological problems that might cause them to harm a particular work of art. *Id.* He added that some famous pieces, such as Michelangelo's *David* and Botticelli's *Birth of Venus*, cause obsessions in some people. *Id.* The price of protecting the art is the distance protective barriers place between the art and the viewer. "The loss is a psychological factor. It's no longer the same. It's colder." *Id.* (quoting Paolucci). The risk of not protecting art, however, is great. Explaining the Uffizi's decision to place Plexiglas barriers in front of some of its paintings, the museum director stated that, "[I]f a madman entered the Uffizi, he would not attack secondary works, so we had to protect the masterpieces . . . the risks are really too high." *Id.* (quoting Anna Maria Petrioli Tofani, director of the Uffizi).

Structures always are threatened by vandalism and abuse. Like substituting a copy for the original object, deciding to place a protective barrier around the art should be moderated by other considerations, such as the possibility of other security measures and the probability of attack.

matter how accurate the reproduction might be. In part we resent having been fooled, but there is more: The magic that only the authentic object can work is dissipated. There seems to be something paradoxical about a reproduction of a genuine, unique artifact, whether it is a painting, a manuscript, or a funerary figure. The truth, the certainty, the authenticity, seem to inhere in the original. "Copies are always second best" ¹⁴⁵

The best solution when balancing the risk of destruction against the value of the authenticity and integrity of an original object seems to be one of moderation: replace with copies those objects that are in danger of destruction, but not necessarily imminent destruction, and either are important works of art that attract tourists or are part of the city's identity.

C. Special Problems in Balancing Preservation and Progress

Florentines may be paying for their cultural heritage with their future. City ordinances restrict homeowners in improving and maintaining their homes; preservation of the piazzas restricts traffic in certain areas; streets cannot be widened to accommodate the growth of the city. ¹⁴⁶ There is simply no room for new industry to build in the city.

Florence, if inescapably locked into its past, is in danger of becoming a dead city, more like Yosemite Park than a European cultural center. Unyielding concentration on the past threatens to stifle the natural progression of the city as a thriving urban community. One 1974 editorial, criticizing a proposal to build an airport in Florence ¹⁴⁷ to accommodate visitors to the city, exemplified the attitude which has encouraged Florence to depend solely on its past for its livelihood. ¹⁴⁸ While ostensibly "recognizing that Florence should be encouraged to thrive as

145. Merryman, *supra* note 1, at 346 (quoting Marianne Bro-Jorgenson, in INTERNATIONAL COUNCIL OF MUSEUMS, INTERNATIONAL COMMITTEE FOR MUSEOLOGY SYMPOSIUM: ORIGINALS AND SUBSTITUTES IN MUSEUMS 157 (ICOFOM Study Series No. 8, 1985)).

146. Susanna Weber-Mazzoni, Lecture at the Protection of Cultural Treasures Seminar, University of Michigan Law School (May 1992).

147. Florence is serviced by the Pisa airport, which may be reached by train or car.

148. Editorial, *A New Florence Airport?*, 116 BURLINGTON MAG. 295 (1974).

a prosperous city,"¹⁴⁹ the piece agreed with the characterization of the airport plan as a "catastrophic development."¹⁵⁰ Arguing that the effects of a nearby airport on the ancient structures in the city had not been studied adequately, it called on its readers to oppose the plan. Although lacking its own airport does not seem to have impeded Florence's tourist trade, some commentators view the city as one big museum, with its responsibility to its cultural artifacts as its only concern.

The one industry which thrives in cities such as Florence—tourism and its offshoots—perversely compounds the risk of those cities losing their vitality. In Rome, traditional industries such as furniture restoration, shoemaking, tailoring, and metalworking have given way to fastfood restaurants and "jeanserias"—as Italians call downtown shops that sell cheap, mass produced goods to tourists and young Italians.¹⁵¹ Over the last thirty years, the population of Rome's historic city center has decreased by half, as McDonald's and T-shirt stands have replaced family housing.¹⁵² "Tourism has helped make Italian cities look the same as any other world resorts. . . . Our cities are losing their character; their social thread is unraveling. They are becoming low-level bazaars."¹⁵³ One Italian city, Perugia, limited the number of jeanserias and fastfood restaurants to "avoid 'an irreversible impoverishment' of the city core."¹⁵⁴ This type of commercial growth in Italy's cities has been characterized as "not progress, but degradation."¹⁵⁵

The tourism industry therefore has created a paradox in Italy:

On the one hand, the arrival of more than 50 million tourists each year increases the peril to art treasures already eroded, pockmarked and blackened by pollution from auto exhaust, central heating and factories.

On the other hand, most tourists come to Italy because of these monuments.

149. *Id.*

150. *Id.* (quoting Letter from Sir Anthony Blunt et al., *THE TIMES* (Mar. 13, 1974)).

151. William D. Montalbano, *Italy Struggles to Hold on to Past as Future Beckons*, *PHILADELPHIA INQUIRER*, May 15, 1988, at A20 ("Mass tourism fuels this change. Many have learned that there is easier profit in selling 'Italians Do It Better' T-shirts to some of the country's 27 million visitors than in repairing old chairs.").

152. *Id.*

153. *Id.* (quoting Antonio Cederna, member of Italy's national Chamber of Deputies).

154. *Id.*

155. *Id.* (quoting Antonio Cederna).

Aware that these tourists provide almost a third of Italy's annual revenue, the government must keep increasing its investment in preserving the art treasures.¹⁵⁶

As a result, Italy must decrease its investment in, or even discourage, new industry. Upkeep of its cultural treasures conflicts with the outgrowth of tourism, but at the same time Italians are limited by preservation restrictions in the types of industries that can be developed. Furthermore, tourism and its off-shoots detract from the character of the cities, which in turn makes the cities less desirable destinations.

Thus, although its treasures make Italy both culturally and economically rich, these benefits are not without costs. Italy is burdened with an overwhelming and perhaps impossible responsibility to the world's citizens. In attempting to balance this responsibility and its interests in economic development, the country has backed itself into a corner: it has become a museum-city in order to preserve its cultural artifacts and to maintain what may be its most profitable industry. The ironic result is that tourism accelerates environmental damage and obviates the necessity of removing artifacts from museums and replacing them with copies. Italy's cities are losing their character and becoming more and more like theme parks. Americans may learn two important and perhaps paradoxical lessons from Italy's experience: that preservation may be accompanied by stagnation, and that what is saved by preservation is invaluable to humanity.

IV. SOME SUGGESTIONS FOR AMERICAN PRESERVATION LAW

To preserve our heritage intelligently and effectively, American preservation law must take into account both our purpose in preserving our historic and cultural objects and the longterm effects of preservation. As shown in Part II, American preservation law has progressed mostly along the lines of an accumulation of preservation rationales. To develop a coherent theory of preservation, the law must examine and choose among possible rationales, such as those offered by Grégoire, and

156. Schmetzer, *supra* note 131, at C27.

address pragmatic problems, such as those experienced by Italy. This Part makes some suggestions and points out some possible drawbacks for courts and legislators to consider in arriving at a coherent theory of preservation.

*A. Grégoire's Rationales and American
Preservation Rationales Compared*

Although American preservation law has accumulated several preservation rationales throughout its development, it has been an indiscriminate accumulation, without real attention to the purposes of preservation. The differing preservation rationales in American law have expanded governmental ability to preserve, while failing to provide a coherent framework for preservation choices. Some of Grégoire's rationales, not presently utilized in American preservation law, such as his national-heritage and society-building rationales, better serve the purposes of preservation by providing a guide for prioritization and for choosing among methods of preservation.

1. *The Spirit of Liberty*—The Abbé Grégoire argued that liberty required “tolerance for difference and respect for creativity.”¹⁵⁷ Grégoire’s idea that works of art are “examples of the free spirit . . . triumphant over political repression, error, and superstition”¹⁵⁸ does not exist in American preservation law.¹⁵⁹ American society, for the most part, has not experienced drastic changes in governing regimes, and thus has not had the same motivation to destroy pre-revolution objects and structures. Moreover, our preservation law is concerned mainly with preserving architecture.

Because the United States proclaims liberty as one of its fundamental political values, at least one example in United States history bears application of Grégoire’s rationale. Southern pre-Civil War plantations, according to Grégoire’s rationale, should be preserved despite their representation of a society built on slavery: “no patron’s motives, however base, can demean the genius of the artist; . . . the human spirit can never be made the mere instrument of tyranny.”¹⁶⁰ Preserving

157. Sax, *supra* note 6, at 1155; see *supra* notes 19–20 and accompanying text.

158. Sax, *supra* note 6, at 1155.

159. See *supra* Part II.

160. Sax, *supra* note 6, at 1155.

plantations for their educational rather than their aesthetic value would also determine the extent of preservation. For example, preserving the plantations but allowing them to age instead of maintaining them in close-to-pristine condition would present the plantations as "emblems of tyranny overcome."¹⁶¹ In this way we preserve them for their educational value but we avoid glorifying the plantations and the value system they represent.

2. *The National Identity*—Grégoire's national-identity rationale could be utilized to preserve objects of our national heritage on a broader level. Given the diversity of our citizenry, this rationale applies not only to preserve battlefields and historic districts, but also to revitalize neighborhoods and communities of all kinds. Grégoire's national-identity rationale has been present to some extent in American preservation law in both the patriotic-inspiration stage¹⁶² and the community stage.¹⁶³ In the American case law embodying the patriotic-inspiration rationale, the genius of our citizens was limited to bravery and heroism, and the heritage of our nation was limited to our government institutions. Recall the language of the Supreme Court in *United States v. Gettysburg Electric Railway Co.*, which emphasized the patriotic and heroic display in the Gettysburg battle.¹⁶⁴ Grégoire, however, envisioned a nation's heritage as more broadly represented by the achievements of its citizens in the arts and sciences, not solely in the arts of war. The *Gettysburg* Court seemed to narrow its purpose of preservation even further, to inspiring citizens to defend their country.¹⁶⁵

Although the community rationale of American preservation law includes some elements of heritage, these are defined on the local level, not on the national level as envisioned by Grégoire. For example, the New York City landmarks law reviewed in *Penn Central* cited the inspiration of "civic pride in the beauty and noble accomplishments of the past."¹⁶⁶ Grégoire, on the other hand, envisioned national pride in citizens' accomplishments. The National Historic Preservation Act comes closest to capturing Grégoire's national-heritage

161. See *supra* note 12 and accompanying text.

162. See *supra* Part II.A.

163. See *supra* Part II.C.

164. See 160 U.S. at 681-82.

165. See *id.*

166. 438 U.S. at 109 (quoting N.Y.C. Admin. Code, ch. 8-A, § 205-1.0(b)).

rationale by recognizing the importance of historic heritage in defining and guiding the nation.¹⁶⁷ While local preservation efforts may focus on the heritage of the locality, it is in the interest of the nation that the history and culture of towns and cities be preserved as part of our national heritage. Preservation laws should make this rationale clear.

Professor Rose's idea that the physical environment defines a community is somewhat analogous to Grégoire's belief that a nation's art defines national identity.¹⁶⁸ The physical environment of a community is different from the national heritage and identity envisioned by Grégoire only in that its goal is familiarity, not pride. Therefore, preservation of the physical environment is achieved more appropriately on a local level than a national level.

Surroundings of a community define the community and orient its inhabitants. This specific rationale of community definition, however, does not appear to have been utilized by the courts. Preserving the familiarity of a community's physical environment allows communities to preserve many of their defining landmarks in a less-than-pristine condition, because age will not lessen the landmarks' familiarity. This rationale has the potential to expand what cities may preserve without impeding the natural growth of the city.

3. The Building Blocks of Society—American preservation law has paid lip service to Grégoire's rationale that past achievements are the building blocks of society, but it has emphasized the preservation of architecture as building blocks of the local area's economy, not of the larger society. Congress, for example, has called preservation of our historic heritage a "vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits."¹⁶⁹ In *Penn Central*, the Court noted that historic buildings should be preserved not only because of their historical value but because of their present educational and inspirational value.¹⁷⁰ Nevertheless, the landmarks law at issue in *Penn Central* probably relied on historic preservation less to maintain beautiful and inspiring buildings than to "support and stimul[ate] . . . business and industry" and "strengthen the economy of the city."¹⁷¹ Reliance

167. See *supra* notes 109–10 and accompanying text.

168. See *supra* notes 79–82 and accompanying text.

169. 16 U.S.C. § 470 (b)(4).

170. 438 U.S. at 108; see *supra* note 105 and accompanying text.

171. See N.Y.C. Admin. Code, ch. 8-A, § 205-1.0(b); *supra* note 94.

on the rationale that past achievements should be preserved as the building blocks of society would help in choosing which objects to preserve. We do not need to preserve every example of a particular style of architecture if we preserve the best or most accessible example.

Grégoire's notion that education of the masses and the nexus between art and ordinary life require preservation of art is conspicuously absent from American preservation law. The reason for their absence may be the difference between the philosophies of the United States and France during Grégoire's time. Grégoire clearly divided the citizenry of France into two groups: the educated and the masses. The connection between cultural artifacts and the masses was twofold. First, the masses had to be taught to appreciate artifacts of high culture, simply for education's sake. Second, education would increase the quality of the work of the masses in the practical industries.¹⁷² In American society, courts and legislatures are disinclined to make such a blatant division. Although we believe in education, we advocate it in a more general sense than Grégoire. Education by itself is an important goal in preserving our national heritage, as opposed to Grégoire's notion that exposing the masses to the fine arts would improve the quality of the practical industries. Much like the sentiment that "in America, anyone can become president," we feel that anyone can be an artist or a scientist. Thus, the rationale for the nexus between art and craft is unnecessary because we are not trying to make better farmers, we are trying to distribute opportunity.

B. Some Problems to Avoid

1. What to Preserve?—The United States has the opportunity to avoid focusing its preservation law on only one segment of history. Keeping the national-heritage rationale in mind, we should choose which objects and structures to preserve so as to represent the entire range of our uniquely diverse heritage. We should preserve not only the history and culture of our Founding Fathers, but also the history and culture of Americans that make our country's heritage particularly rich. We should

172. See *supra* notes 26–30 and accompanying text.

preserve the achievements of different segments of our population, such as quilts made by pioneer women, Native American art, ethnic churches and neighborhoods, and a host of others.

Given the relative youth of our country, we also have the opportunity to better choose between continuity and antiquity. Professor Lowenthal characterizes these conflicting goals by asserting that:

The virtues inherent in continuity often conflict with those prized in antiquity. Preservation and restoration principles reveal a similar opposition: those who hold antiquity supreme would excise subsequent additions and alterations to restore buildings to their 'original' condition; those devoted to continuity would preserve all the accretions of time, witnesses to their entire history.¹⁷³

The experience of Italy demonstrates that continuity seems the better choice. Allowing structures to represent the dynamics of society rather than a static, and perhaps arbitrary, past, better serves the rationales of preservation, because preservation should help communities to thrive, not stagnate.

2. *How to Preserve*—Restoration, copying cultural objects, and removing pieces from their situs involves some potentially painful choices:

What kind of relics make the past most vivid? Those that are bright and clean, some insist, full of the sparkle of youth they had when new. For others the marks of use and time are crucial to living continuity. A past freshly made or revived and a past convincingly scored by time and use answer different needs and inspire different consequences.¹⁷⁴

Drawing again on the experience of Italy, the pristine state of the object or structure may be less important than the value and recognition society gives it through preservation efforts. A landmark that was once comfortable and familiar may become unfamiliar and disturbing, such as the now-gaudy East Doors of the Florentine Baptistry.¹⁷⁵ As F. Scott Fitzgerald's *Gloria* criticized the excessive restoration of Robert E. Lee's home, "Trying to preserve a century by keeping its relics up to date is like keeping a dying man alive by stimulants. . . .

173. LOWENTHAL, *supra* note 12, at 62 (footnote omitted).

174. *Id.* at 181.

175. *See supra* Part III.B.3.

There's no beauty without poignancy and there's no poignancy without the feeling that it's going, men, names, books, houses—bound for dust—mortal.”¹⁷⁶ However, objects preserved for their educational or aesthetic value may require more than simple maintenance, as preserving their pristine state may be desirable and in keeping with the purpose of preserving them.

3. *Preservation vs. Progress*—Our past is inextricably linked to our future. We sometimes see the past, however, as a burden on the future: “Reverence for the past is commonly seen to inhibit change, embargo progress, dampen optimism, stifle creativity.”¹⁷⁷ The tension between the past and the future is the “tension between tradition and change, imitation and innovation, preservation and creation.”¹⁷⁸ We must balance the past and the future: if we place too much emphasis on one, the other will suffer. A successful balancing of our past and future, or preservation and progress, allows us to build on our heritage without being trapped in our past or sacrificing the foundations of our future.

Preservation of our past, although a necessary component of a successful society, should not impede society's growth and change. The United States should use its preservation law to help our communities to progress, not to lock them into the past like Florence. The preservation rationales discussed throughout this Note have the goal of bettering society in common. Toward this end, preservation efforts should be tailored to meet applicable rationales and should be balanced against progress. By adopting a coherent theory of preservation, we can concentrate our preservation efforts effectively on those things deemed important according to a particular rationale and American communities can avoid the museum-trap exemplified by Florence.

CONCLUSION

Preservation of our historic and cultural objects is a necessary foundation of our society. American law, however, has not adopted a coherent theory of preservation, nor has it adequately taken into account the problems of preservation.

176. F. SCOTT FITZGERALD, *THE BEAUTIFUL AND THE DAMNED* 167 (1950).

177. LOWENTHAL, *supra* note 12, at 65.

178. *Id.* at 75.

To preserve our historic and cultural objects intelligently and effectively, American law should consider the rationales behind preservation, as well as potential problems historically encountered in preservation efforts.